85-615

Supreme Court, U.S.
FILED
OCT 8 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE STATE OF CALIFORNIA, acting by and through the Department of Transportation, et al.,

Petitioners,

v.

NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, etc., et al.,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of California

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80 pp

QUESTIONS PRESENTED

1. Whether the State of California has inherent power to regulate outdoor advertising signs located on Indian lands but directed toward a state (interstate) highway, and thus impacting the safety and aesthetics of the public using the highway.

2. Whether, if the State of California has the power to regulate outdoor advertising signs located on Indian lands and directed toward a state highway, the power has been preempted by the Highway Beautification Act whose purpose was to curtail the proliferation of signs.

PARTIES

This case was consolidated with *Desert Outdoor Advertising, Inc.* v. *Naegele Outdoor Advertising Company of California* (Riverside County Superior Court No. 137500). It is our understanding that Desert Outdoor Advertising, Inc., has or will file a Petition for Writ of Certiorari.

The Morongo Band of Mission Indians appeared as amicus curiae.

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Petitioners,

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NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, etc., et al.,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of California

The California Department of Transportation petitions for a Writ of Certiorari to review the judgment of the Supreme Court of the State of California in this case.

OPINIONS BELOW

The opinion of the Supreme Court of the State of California (Appen. A, *infra*) is reported at 38 Cal.3d 509 [698 P.2d 150, 213 Cal.Rptr. 247]. The Supreme Court modified the opinion (Appen. B, *infra*) and denied re-

hearing on July 10, 1985. The modification is reported at 38 Cal.3d 912(a). The opinion of the Court of Appeals, Fourth District (Appen. C, *infra*) is not officially reported but is reported at 199 Cal.Rptr. 605.

JURISDICTION

The judgment of the Supreme Court of the State of California (Appen. A, *infra*) was entered on May 2, 1985. A petition for rehearing was denied on July 10, 1985 (Appen. C, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, section 8, clause 3, of the United States Constitution provides in relevant part:

> "[The Congress shall have power] to regulate commerce . . . with the Indian tribes;"

2. Article VI, clause 2, of the United States Constitution provides in pertinent part as follows:

> "This Constitution, and the laws of the United States . . . shall be the supreme law of the land . . . ."

3. The Highway Beautification Act (23 U.S.C. § 131(h) and (k); entire section appears in Appen. D, *infra*) provides in pertinent part as follows:

> "(h) All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary."

"(k) . . . nothing in this section shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-aid highway systems than those established under this section."

4. California Business and Professions Code section 5226 (entire section appears in Appen. E, *infra*), provides in pertinent part:

"The regulation of advertising displays adjacent to any interstate highway or primary highway . . . is hereby declared to be necessary to promote the public safety, health, welfare, convenience and enjoyment of public travel, to protect the public investment in such highways, to preserve the scenic beauty of lands bordering on such highways, and to insure that information in the specific interest of the traveling public is presented safely and effectively, recognizing that a reasonable freedom to advertise is necessary to attain such objectives. . . ."

STATEMENT OF THE CASE

The Morongo Band of Mission Indians entered into an agreement with the respondent, Naegele Outdoor Advertising Company of California, to install, construct, operate and maintain 15 outdoor advertising structures located on Indian land adjacent to Interstate 10. The petitioner, California Department of Transportation (hereafter Department), notified respondent, Naegele Outdoor Advertising Company (hereafter Naegele), that the Department would enforce California's Outdoor Advertising Act. The petitioner Department cited 16 displays. On July 10, 1978, the petitioner filed a com-

plaint and motion for preliminary and permanent injunction against respondent Naegele. A preliminary injunction was granted August 1, 1978. The Department's motion for summary judgment was granted November 6, 1981.

The summary judgment was affirmed by the California Court of Appeal, Fourth District, Division Two, on February 28, 1984 (Appen. C, *infra*).

The California Supreme Court reversed the summary judgment on May 2, 1985 (Appen. A, *infra*, 38 Cal.3d 509 [698 P.2d 150, 213 Cal.Rptr. 247]). The California Supreme Court denied the Department's petition for rehearing and slightly modified the opinion on July 10, 1985 (Appen. B, *infra*, 38 Cal.3d 912(a)).

The gist of the opinion was that the congressional intent of the Federal Highway Beautification Act (23 U.S.C. § 131) was to either leave Indian reservations entirely unregulated or more likely to repose exclusive jurisdiction to ensure compliance with federal agencies.

STATEMENT OF REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. Contrary to decisions by this Court, the state's interest in regulating Indian land was not given appropriate weight and no real inquiry was made to determine if the exercise of authority would violate federal law.

The California Supreme Court has held that the right of the state to regulate billboards adjacent to state (interstate) highways has been preempted by the Highway Beautification Act of 1965 (23 U.S.C. § 131). Contrary to several opinions of this Honorable Court, the impor-

tance of this state interest (protection of travelers on a state highway) has been given little or no weight. There has been no balancing of this state interest with the interests of the federal government or the Indians. Any detailed look at these respective interests would show that the state's interest is strong and the federal and Indian interests are weak.

For over 20 years this Honorable Court has stated that ". . . [S]tate laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by Federal law." (*Organized Village of Kake* v. *Egan* (1962) 369 U.S. 60 at p. 75.)

This Honorable Court has thus required a ". . . particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." (*White Mountain Apache Tribe* v. *Backer* (1980) 448 U.S. 136 at P. 145.) "The State's interest in exercising its regulatory authority over the activity in question must be examined and given appropriate weight." (*Ramah Navajo School Bd.* v. *Bureau of Revenue of New Mexico* (1982) 458 U.S. 832 at p. 838.)

In the instant case, the California Supreme Court's only recognition of the state's interest was the mention of the California code section (Bus. & Prof. Code, § 5226) which states that regulation of advertising displays is declared "necessary to promote the public safety, health, welfare, convenience and enjoyment of

public travel . . . and to insure that information in the specific interest of the traveling public is presented safely and effectively . . . ." (Appen. A, p. 20). It also mentioned that regulations dealing with size, spacing and location are safety measures (Appen. A, p. 20). There is no further mention of the state's interest or any balancing of this interest against the federal or Indian interest.

The gist of the California Supreme Court's determination of the federal interest dealt with the perceived thought that Congress either did not want any regulation of Indian land or wanted regulation only by the federal government. Nowhere is there a discussion or consideration of the fact that the Highway Beautification Act was designed to stop the proliferation of billboards, that states were specifically not prohibited from further restrictions on billboards (23 U.S.C. § 131(k)), nor any indication of how the state's restrictions on billboards would frustrate the intent of Congress to reduce such proliferation.

The only other mention of federal interest is that there are general federal regulations (25 C.F.R. § 162 et seq.) relating to the leasing of Indian lands (Appen. A, pp. 30, 31, fn. 9). Again there is no mention of any conflict with this general authority.

The Indians' interest is primarily pecuniary, since their reservation is poor and the highest and best use of the property adjacent to Interstate 10 is outdoor advertising directed off the reservation toward the travelers on Interstate 10.

Thus, without balancing these interests and determin-

ing where, if at all, state regulation would interfere with the objectives of the Highway Beautification Act, the California Supreme Court held that the Highway Beautification Act preempted the state law designed to protect travelers on the state's own highways. If this is the law, then we are back to the clarity of Chief Justice John Marshall's concept in *Worcester* v. *Georgia* (1832) 6 Pet. 515, 556–557, to the effect that only the federal government can regulate Indians.

2. This case should clarify the importance of off-reservation impacts in analyzing preemption, and clearly demonstrate that the impacts may be nonphysical, such as a sight impact here which affects safety and aesthetics.

This case presents the opportunity to further clarify the statements in recent cases stating that impacts off the reservation are important. (*New Mexico* v. *Mescalero Apache Tribe* (1983) 462 U.S. 324 at p. 336.)

This Honorable Court has held that sales of liquor (*Rice* v. *Rehner* (1983) 463 U.S. 713) and conservation (*Puyallup Tribe* v. *Washington Game Dept.* (1977) 433 U.S. 165) are two impacts that should be considered. This case involves a nonphysical but important off-reservation impact—safety of and view by the traveling public on state highways. This is particularly critical when, as here, the value was created by the highway and the billboards are designed and aimed at the public on the highways. The importance of this off-reservation element, which should weigh heavily in balancing the relevant federal, tribal and state interests, can be clarified by this case.

3. This case may well lead to a proliferation of billboards on Indian land and will lead to much litigation.

This case, if allowed to stand, will have ramifications not only in California but in every state with Indian reservations. Even if the case is not followed, it stands to reason that because of the exemption from restrictions authorized here, and the money to be made from outdoor advertising, many cases will be litigated over the issue of state control of outdoor advertising on Indian reservations. If the present case is followed, the result will be a proliferation of billboards contrary to the intent of the Highway Beautification Act.

CONCLUSION

This case will set a precedent not only in the narrow but important area of outdoor advertising on Indian reservations, but also in the requirements for the depth of consideration of the federal, Indian and state interests involved in a consideration of preemption. A clear indication from this Honorable Court that one must look beneath the superficial interests in order to arrive at a true balance will result in more equitable treatment of the parties involved.

Wherefore, your petitioner respectfully requests that this Writ of Certiorari be granted.

Respectfully submitted,

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OCTOBER 1985

APPENDIX A

COPY

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE ex rel. DEPARTMENT OF TRANSPORTATION, *Plaintiff and Respondent,* v. NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC., *Defendant and Appelant.*	L.A. 31911 (Super.Ct.No. 126069)
DESERT OUTDOOR ADVERTISING, INC., *Plaintiff and Respondent,* v. NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC., *Defendant and Appelant.*	(Super.Ct.No. 137500)

This case presents the question whether the State of California may regulate billboards on Indian reservations. Upon examination of the statutes, legislative history, and precedents involved, we conclude that the state's regulatory authority is preempted by federal law.

This consolidated appeal stems from two separate judgments entered after the trial court granted each

1.

SEE CONCURRING OPINION

plaintiff's motion for summary judgment. Both cases, tried separately below, raise substantially the same issues and involve the same defendant. Because resolution of these issues will have a significant effect on the Morongo Band of Mission Indians, its request to file a brief amicus curiae was granted.

The Morongo Band of Mission Indians (Band) is a federaly recognized Indian tribe, and is the beneficial owner of the Morongo Indian Reservation, consisting of approximately 32,300 acres of land located in Riverside County, California. The Morongo Indian Reservation was created by a series of seven executive orders of various Presidents of the United States, one presidential proclamation, one federal statute, and one deed, beginning in 1876 and ending in 1948. Under Patent Number 172786, the United States declared it will hold the said tracts of land ". . . in trust for the sole use and benefit of the said Morongo Band or Village of Indians, according to the laws of California . . . ."

The reservation lies astride a narrow pass between the San Bernardino and San Jacinto Mountain Ranges. As a result only a small portion of the land is located on the plain suitable for economic development. These relatively few acres lie adjacent to Interstate Highway 10, connecting Los Angeles to popular Southern California desert communities.

In addition to the interstate highway, the reservation is crossed by a main line of the Southern Pacific Railroad, the Colorado River Aqueduct, major oil transmission pipelines, natural gas pipelines, and numerous electrical transmission lines, all of which serve the metropolitan Los Angeles area without any significant benefit to the reservation or its residents. The reservation's few natural resources yield little income so that, despite the Band's apparent advantageous location, its economy is depressed. Many of its members are unemployed and live in poverty.

For many years, the Band has derived a major part of its income from outdoor advertising activities. The Band's general membership has determined that the highest and best use of reservation land adjacent to Interstate 10 is for outdoor advertising. In a 1977 appraisal report, the Southern California Appraisal Office of the Bureau of Indian Affairs came to the same conclusion.

Accordingly, the Band's general membership delegated to its tribal council authority to negotiate agreements for an outdoor advertising business. The Band leased some of this reservation land to non-Indian firms who operated billboards there until 1977. In 1977 the Band solicited proposals for further leases from several non-Indian firms including Naegele Outdoor Advertising Company of California, Inc. (Naegele) and Desert Outdoor Advertising, Inc. (Desert). Naegele's bid was selected and a lease agreement followed.

Pursuant to title 25 of the United States Code, the Department of the Interior (Interior) must approve

such leases before they become effective. (25 U.S.C. § 415.) Upon submission, approval was denied because the lease's purpose, in the Sacramento area director's opinion, would have violated the Highway Beautification Act (23 U.S.C. § 131 et seq.) and California's Outdoor Advertising Act (Bus. & Prof. Code, § 5200 et seq.). The Band appealed this decision and the Interior Board of Indian Affairs reversed. In its opinion, the board concluded that the provisions of the Highway Beautification Act do not apply to Indian reservations and that California's Outdoor Advertising Act cannot be enforced on tribal Indian lands. (Administrative Appeal of the Morongo Band of Mission Indians v. Area Director, Sacramento Area Office (1979) 86 Interior Dec. 380 (Admin. Appeal).)

During the pendency of the Interior appeal, on March 30, 1978, the Band entered into an agency agreement [1] with Naegele. This agreement provided for the installation, construction, operation and maintenance of 15 outdoor advertising structures located on reservation land. On June 27, 1978, the California Department of Transportation (Department) notified Naegele of its intention to apply and enforce California's Outdoor Advertising Act.

Despite the Department's warning and the implication that the displays would violate the Outdoor Adver-

[1] We take judicial notice of the fact that this agency agreement was approved on or about February 2, 1984, by the Bureau of Indian Affairs.

tising Act, 16 billboards were erected on reservation land. The state outdoor advertising inspector ultimately issued citations for all 16 displays.

On July 10, 1978, the People of the State of California, acting by and through the Department, filed a complaint and motion for preliminary and permanent injunction against Naegele. The complaint alleged Naegele was in control of 16 outdoor advertising structures located adjacent to Interstate Highway 10 in Riverside County. These structures were in violation of section 5350 of the Business and Professions Code, requiring display permits. Additionally these displays were situated in violation of various provisions of the Outdoor Advertising Act. The Department identified these displays as a public nuisance within the meaning of Business and Professions Code section 5461.

The preliminary injunction was granted on August 1, 1978. And, on November 6, 1981, in accordance with the Department's motion, summary judgment resulted.

Desert's action, here consolidated with that of the Department, was initially filed on June 26, 1980. In its first amended complaint of December 12, 1980, Desert alleged causes of action for nuisance, unfair competition, intentional interference with prospective economic benefit and negligent interference with prospective economic benefit. Naegele's demurrer was sustained as to the nuisance cause of action. The court dismissed both causes of action for interference and granted Desert's motion for summary judgment on the unfair competition cause of action. In its order the court enjoined

Naegele from maintaining advertising structures on the reservation without complying with the Outdoor Advertising Act. Naegele was ordered to remove all noncomplying structures. The enforcement of this judgment was stayed pending appeal.

The question we must answer on appeal is whether the Department can, through the Outdoor Advertising Act, regulate billboards erected on reservation land held in trust by the United States for the beneficial use of the Band. This inquiry requires us to consider several subsidiary questions.

In 1832, Chief Justice Marshall opined, with enviable clarity, that Indian tribes were wholly distinct nations within whose boundaries "the laws of [a State] can have no force." (Worcester v. Georgia (1832) 6 Pet. 515, 561.) In the interim, however, the United States Supreme Court has departed from this view and acknowledged certain limitations upon tribal sovereignty. For example, " '[t]he sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and *is subject to complete defeasance.*' " (Rice v. Rehner (1983) ____ U.S. ____ [103 S.Ct. 3291, 3295], quoting United States v. Wheeler (1978) 435 U.S. 313, 323, with added emphasis.)

It is apparent that Congress may delegate its power over the governance of Indian reservations to the states. The Department argues that, in the context of outdoor advertising, Congress has done so through the Highway Beautification Act.

The Highway Beautification Act of 1965 was enacted to provide for scenic development and road beautification of the federal-aid highway systems. Title I of the act (23 U.S.C. § 131) contains requirements for the control of outdoor advertising.

In general, the act seeks to eliminate outdoor advertising displays within 660 feet of the edge of any interstate or federal primary system highway. Toward this end, the act mandates a 10 percent cut in federal-aid highway funds to any state which fails to provide for "effective control" over the erection and maintenance of such displays. (23 U.S.C. § 131(b).)

Title 23 United States Code section 131(c) explains that "effective control" means that, with five specified content-based exceptions none of which apply in this case, all such displays shall be banned.[2]

The act clearly contemplates that the states will achieve compliance through their inherent powers of zoning and condemnation. (23 U.S.C. § 131(d)–(g).) The act also provides that, at the states' option, advertising displays may be permitted within 660 feet of inter-

[2] The act limits the content of such devices to five acceptable categories. Loosely defined, they are: (1) signs advertising scenic attractions, (2) signs advertising sale or lease of property upon which displays are located, (3) signs advertising activities conducted on the property on which displays are located, (4) landmark signs, and (5) signs advertising the distribution of free coffee to travelers. The signs in category 1 are to conform to standards regulating size, spacing, etc. "to be promulgated by the Secretary." (23 U.S.C. § 131(c).)

At the time of the enactment of the Highway Beautification Act in 1965, "the Secretary" was the Secretary of Commerce; in 1966 Congress created the Department of Transportation and all powers and duties under this act were transferred to the Secretary of Transportation (Pub. L. No. 89-670 (Oct. 15, 1966) 80 Stat. 931.)

state and federal highways within areas zoned industrial or commercial under state law. (23 U.S.C. § 131(d).)

California complies with the Highway Beautification Act through its Outdoor Advertising Act (Bus. & Prof. Code, § 5200 et seq.). This act explicitly recognizes that outdoor advertising is a legitimate commercial use of property adjacent to roads and highways and provides that such advertising "should be allowed to exist in business areas." (*Id.*, § 5226.) The act also provides, however, that it is the policy of the state "to promote the public safety, health, welfare, convenience and enjoyment of public travel, to protect the public investment in such highways, to preserve the scenic beauty of lands bordering on such highways, and to insure that information in the specific interest of the traveling public is presented safely and effectively . . . ." (*Ibid.*)

The act then provides for restrictions upon outdoor advertising consonant with the provisions of the Highway Beautification Act. For example, outdoor advertisers must obtain permits before placing displays within 660 feet of the right-of-way of interstate and primary highways. (Bus. & Prof. Code, § 5350.) The content of allowable displays within this area is limited to the same categories as specified by the Highway Beautification Act. (*Id.*, § 5405.) Finally, certain safety measures involving size, spacing, and location are imposed. (*Id.*, §§ 5403, 5405, 5408.)

The Department contends that it may enforce the provisions of the Outdoor Advertising Act on Indian reservations because Congress expressly delegated such

enforcement authority to the states through the Highway Beautification Act. Naegele and the Band, on the other hand, argue that this is a misinterpretation of the federal law.

Subdivision (h) of the federal act provides: "All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary." According to the Department, this provision clearly expresses Congress's intention to include Indian reservations under the provisions of the Highway Beautification Act and to give states the authority to enforce the act's provisions on Indian reservations.

Naegele and the Band argue that the phrase "public lands or reservations of the United States" was not intentended to include Indian reservations. They find support for this view in the opinion of the Interior Board of Indian Appeals. (Admin. Appeal, supra, 86 Interior Dec. 680.) The board examined the statute, concluded that it was ambiguous, and interpreted its ambiguities in favor of the Indians. On this basis it concluded that Congress did not intend the Highway Beautification Act to apply to Indian reservations.

The board's interpretation of the Highway Beautfication Act is debatable (United States v. Portneuf-Marsh Valley Irr. Co. (E.D. Idaho 1913) 205 Fed. 416, 419, affd. (9th Cir. 1914) 213 F. 601, 603) but we need not resolve that debate here. Even assuming that the act was in-

tended to apply to Indian reservations, it does not follow that Congress has authorized *state enforcement* of the act on such reservations, or indeed on any federal lands.

Several years before the enactment of the Highway Beautification Act, Congress made an earlier attempt to regulate outdoor advertising adjacent to federally funded highways. In 1958, Public Law No. 85-767 (72 Stats. 885, former 23 U.S.C. § 131) established standards similar to those of the later act and similarly relied upon the states for enforcement. This legislation provided that states which agreed to comply with federal outdoor advertising standards would be entitled to a one-half of 1 percent bonus in federal highway funding. The section of this law applicable to federal lands read: "Whenever any portion of the Interstate System is located upon or adjacent to any public lands or reservations of the United States, *the Secretary of Commerce may make such arrangements and enter into such agreements with the agency having jurisdiction over such lands or reservations as may be necessary to carry out the national policy . . .* , and any such agency is authorized and directed to cooperate fully with the Secretary of Commerce in this connection." (*Id.*, § 131(d), emphasis added.)

Thus the 1958 law clearly did not grant the states authority to enforce highway beautification provisions on federal lands and reservations. Rather, enforcement authority was reserved to the federal agencies having jurisdiction over such lands.

Desert argues that the fact that Congress did not repeat this language in the 1965 act is a clear indication that it wished to transfer enforcement authority over "public lands and reservations" from the federal agencies "having jurisdiction over such lands and reservations" to the states. We do not find this argument persuasive.

The House Report summarizing the legislative intent of the Highway Beautification Act states "[section h] simply extends to all public lands and reservations of the United States which are adjacent to any portion of the Interstate System or the primary system *the same controls* covering other roads which are subject to this legislation." (1965 U.S. Code Cong. & Admin. News, p. 3717 (89th Cong., 1st Sess.), emphasis added.) This summary description could indicate that Congress intended to maintain the same enforcement mechanism it had developed in the 1958 law. Thus, the act's standards (or "controls") would apply to all public lands and reservations of the United States. But, while the states would enforce these controls on state-owned and on private lands through their zoning and condemnation authority, federal agencies would enforce the controls on federal lands through their independent statutory authority over such lands.

Administrative and judicial interpretations of the Highway Beautification Act support this view. [3] In 1970,

[3] The earliest administrative interpretation of the act of which we are aware is a memorandum opinion from the Associate Solicitor for Indian Affairs to the Commissioner of Indian Affairs, Department of the Interior, dated April 7, 1967. This opinion is consistent with our interpretation. Although the opinion concluded that Indian reservations "are subject to regulation under the [High-

the Secretary of the Interior promulgated regulations for the issuance of permits for outdoor advertising on pubic lands under the jurisdiction of the Bureau of Land Management. (Former 43 C.F.R. 2921.0-6.) [4] These regulations effectively prohibited the issuance of permits for outdoor advertising which would not have complied with the standards of the Highway Beautification Act.

In 1977, the Ninth Circuit upheld these Interior Department regulations against a challenge mounted by an outdoor advertising company in Nevada which asserted, inter alia, that Interior's authority to regulate in this area had been preempted by the Highway Beautification Act. (Ryan Outdoor Advertising, Inc. v. United States (9th Cir. 1977) 559 F.2d 554.) The court noted that Interior's authority to administer the laws dealing with federal lands was both well established and "almost plenary." "The fact that Congress has authorized the [federal] Department of Transportation to *set general standards* on outdoor advertising which apply to public lands as well as to private does not preempt continued regulation of the same public lands by the Secretary of

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way Beautification] [A]ct," it did not address the issue of state authority to enforce the act's provisions on federally owned lands and did not suggest that state enforcement had been authorized by Congress.

[4] These regulations, specifically directed toward the issuance of permits for outdoor advertising, disappeared in a general reorganization and renumbering of the regulations which occurred in 1981. The new regulations, which discuss the leasing of public lands in more general terms, make no specific mention of outdoor advertising. (46 Fed. Reg. 5777 (Jan. 19, 1981) 43 C.F.R. 2920.0-1 et seq.)

the Interior. . . . [¶] There is simply no indication that Congress intended in the Highway Beautification Act the significant alteration of a persuasive, well-established regulatory scheme. . . ." (*Id.*, at p. 556, emphasis added.)

In addition, recent precedents in other contexts establish that congressional authorization of state regulation on federal property will be found only where Congress's mandate is explicit. In a pair of cases, the United States Supreme Court has considered the question whether federal statutes mandating state pollution control legislation have the effect of subjecting federal installations and activities located within the states to state regulation. The court concluded that "[b]ecause of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent that there is 'a clear congressional mandate,' 'specific congressional action' that makes this authorization of state regulation 'clear and unambiguous.' " (Hancock v. Train (1976) 426 U.S. 167, 179, fns. omitted; see also EPA v. State Water Resources Control Board (1976) 426 U.S. 200.) These cases suggest that congressional authorization of state regulatory action on reservation land held in trust by the United States for the beneficial use of reservation Indians should require a similarly clear and unambiguous mandate.[5] We dis-

[5] See also State of Washington v. Environmental Protection Agency (9th Cir. Feb. 6, 1985) ___ F.2d ___ (CA No. 83-7763) upholding the EPA's conclusion that the federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. section 6901 et seq., "does not

cern no such explicit mandate in the Highway Beautification Act.

Further, as noted above, the Highway Beautification Act contemplates that the states will achieve compliance through the use of their inherent powers of zoning and eminent domain. Yet tribally owned Indian reservation land is not subject to state powers of eminent domain (Minnesota v. United States (1939) 305 U.S. 382; United States v. 10.69 Acres of Land (9th Cir. 1970) 425 F.2d 317), and states are not authorized to enforce their land-use regulations on Indian reservations (Santa Rosa Band of Indians v. Kings County (9th Cir. 1975) 532 F.2d 655, cert. den. (1977) 429 U.S. 1038). Additionally, Indian tribes are immune from suit in the absence of an effective waiver or consent. (Puyallup Tribe v. Washington Game Dept. (1977) 433 U.S. 165, 172.) The Supreme Court has held that, while Congress can authorize suits against Indian Nations, a waiver of sovereign immunity cannot be implied but must be unequivocally expressed. (Santa Clara Pueblo v. Martinez (1978) 436 U.S. 49, 58.) [6]

It appears logically imperative that, had Congress intended the states to enforce the provisions of the High-

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give the state jurisdiction over Indian lands, and that states could possess such jurisdiction only through an express act of Congress or by treaty" even though Indian tribes are clearly regulated entities under RCRA and the act authorizes state regulation in lieu of the federal program.

[6] In *Santa Clara Pueblo*, supra, 436 U.S. 49, the United States Supreme Court held that Congress's action in enacting the Indian Civil Rights Act of 1968 (25 U.S.C. §§ 1301–1303) which, in relevant part, provides that "[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws" (§ 1302(8)), could not be interpreted as an implicit waiver of the tribes' immunity from suit. The court concluded that such a waiver requires an "unequivocal expression of . . . legislative intent. . . ." (*Santa Clara Pueblo*, supra, 436 U.S. at p. 59.)

way Beautification Act against nonconforming advertising displays located on Indian tribal lands, it would have empowered the relevant state authorities to condemn reservation lands, to regulate tribal land use, and to sue Indian tribes. No such authorization can be found in the Highway Beautification Act.

We therefore conclude that, even if Congress intended the outdoor advertising standards of the Highway Beautification Act to apply on Indian reservations, it did not intend that these standards be enforced through the assertion of state power. Thus, we reject the Department's argument that the Highway Beautification Act authorizes state regulation of outdoor advertising on Indian reservation lands.

Both the Department and Desert argue alternatively that the act of August 15, 1953 (Pub. L. No. 83-280, 67 Stat. 589 (commonly known as Public Law 280)) confers upon the State of California the authority to enforce its Outdoor Advertising Act on Indian reservation lands. This position is untenable.

Although section 4 of Public Law 280, codified at 28 United States Code section 1360, appears to provide that all state laws of general application are effective on Indian reservations within the specified states,[7] the law

[7] Section 4(a), as codified at 28 United States Code section 1360(a) (1976), provides: "(a) Each of the States . . . listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State . . . has jurisdiction over other civil causes of action, and those civil laws of such State . . . that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State . . . : . . . . California . . . . . All Indian country within the State."

has not been so construed by the federal courts. In Bryan v. Itasca County (1976) 426 U.S. 373, the Supreme Court, reasoning that "the primary intent of § 4 was to grant jurisdiction over private civil litigation involving reservation Indians in state court" (*id.*, at p. 385), concluded that Public Law 280 did not give Minnesota the authority to tax the personal property of Indians living on a reservation. More recently, the Ninth Circuit concluded that Public Law 280 does not authorize the enforcement of state and county laws controlling the conduct of bingo games on Indian reservations in California. (Barona Group of Capitan Grande Band, etc. v. Duffy (9th Cir. 1982) 694 F.2d 1185.) The court noted: "The Supreme Court . . . has construed [section 4] to mean that states have jurisdiction *only* over private civil litigation involving reservation Indians in state court. [Citation.] Thus a state may not impose general civil/regulatory laws on the reservation." (*Id.*, at pp. 1187–1188, emphasis added.) Neither Desert nor the Department advances any convincing argument why we should diverge from the *Barona* court's conclusion. We therefore conclude that state enforcement of the Outdoor Advertising Act on Indian reservations is not authorized by Public Law 280.[8]

[8] The Department also appears to argue that the Secretary of the Interior's notice supplementing 25 Code of Federal Regulations section 1.4, published at 30 Federal Register 8722 (July 2, 1965), provides an independent basis for its assertion of state regulatory authority over Indian lands. This notice, however, specifically provides: "Nothing contained in this notice shall be construed to in any way alter or limit the provisions of [Public Law 280]." In light of this proviso, we are satisfied that the Secretary's directive is merely an attempt to interpret the aims of Congress in enacting Public Law 280. As such, it should not be construed to endow the state with broader general regulatory authority over Indian lands than mandated by the congressional enactment.

For these reasons we determine that Congress has not authorized state regulation of outdoor advertising on Indian reservations. This does not end our inquiry, however.

The United States Supreme Court has observed that under certain circumstances a state may validly assert authority over on-reservation activities even in the absence of a congressional mandate to do so. (New Mexico v. Mescalero Apache Tribe (1983) ___ U.S. ___ [103 S.Ct. 2378, 2384–2385].) It may be argued that this is such a case.

The Department cites Rice v. Rehner (1983) 103 S.Ct. 3291, Puyallup Tribe v. Washington Game Dept. (1977) 433 U.S. 165, and Mescalero Apache Tribe v. Jones (1973) 411 U.S. 145, among others, as examples of cases in which state regulation of Indian activities has been found permissible. But these cases are inapposite.

In Rice v. Rehner, the court found that Congress had expressly provided for the application of state law. (*Rice*, supra, 103 S.Ct. 3291, 3302.) In Mescalero Apache Tribe v. Jones and Puyallup Tribe v. Washington Game Dept., the court scrutinized pertinent federal law and discerned no intent to preempt state authority. The situation is quite different here.

More than 10 years ago, the Supreme Court noted that, in the area of state regulation of tribal enterprises, generalizations have become treacherous. Nonetheless, amid the welter of decisions analyzing preemption in

this unique context, the Supreme Court has recently reaffirmed that "a State will certainly be without jurisdiction if its authority is preempted under familiar principles of preemption . . . ." (*New Mexico*, supra, 103 S.Ct. at p. 2386.)

Among these "familiar principles" is the following. Whether federal legislation preempts state law "is a matter of legislative intent. In ascertaining this intent, . . . the test . . . is whether the enforcement of state law would conflict with the purposes of the federal legislation, whether by frustrating an affirmative federal purpose or by interfering with a matter intentionally left unregulated by Congress." (Loma Portal Civic Club v. American Airlines, Inc. (1964) 61 Cal.2d 582, 591.)

The Highway Beautification Act clearly represents Congress's intent to design a comprehensive scheme for the regulation of outdoor advertising adjacent to federal highways throughout the United States. In Interior's view, Congress intended to leave Indian reservation lands entirely unregulated under the act. In our opinion, Congress may have intended the act's provisions to apply on Indian reservations. But if so, it reserved to federal authorities the responsibility for enforcing the act's provisions upon federal lands and reservations. In either case, the assertion of state regulatory authority in this area would clearly conflict with Congress's purposes, either by subjecting Indian enterprises exempt from control under the federal act to state regulation, or by imposing inconsistent state regulations in an area reserved for federal oversight. [9]

[9] Interior's authority to supervise the enterprise at issue here cannot be doubted. Under 25 United States Code section 415(a) Indian

For this reason, we conclude that the state's regulatory authority in this area is preempted by the operation of federal law and the judgment in favor of the Department must be reversed. [10]

Desert's judgment on the complaint of unfair competition must also be reversed. [11] This action is premised upon the language of Business and Professions Code section 17200 which defines "unfair competition" to include any "unlawful" business practice. Desert admits that if Naegele's conduct is not forbidden by law, there is no unfair competition. We have concluded that California law cannot be applied to regulate the billboards at issue. And, even if Naegele's conduct could somehow be construed as violative of federal law, state court injunctive relief under the theory of unfair competition is inappropriate.

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lands may be leased for business purposes only "with the approval of the Secretary of the Interior." In accordance with this statutory authorization, the Secretary has issued extensive regulations pertinent to the leasing of Indian lands. (25 C.F.R. § 162 et seq.)

The record amply indicates that the Band's outdoor advertising enterprise has been encouraged and approved by the Bureau of Indian Affairs. By contrast the Department has presented evidence that every one of the 16 advertising displays involved here is in violation of substantive provisions of state law.

[10] With all due respect to our concurring colleague, we see little resemblance between this case and In re Wilson (1981) 30 Cal.3d 21, except for the fact that both involve Indians. The question in *Wilson* was "whether extinguishment of the [Pit River] tribe's Indian title to, or right to occupy, their aboriginal territory operated to extinguish the tribe's aboriginal hunting rights." (*Id.*, at p. 24.) No issue pertaining to regulation of activity on reservations, or of federal preemption, was involved.

[11] Desert initially filed a cross-appeal as to its three other causes of action. This cross-appeal was dismissed at Desert's request on March 8, 1983.

A similar question was raised in Diaz v. Kay-Dix Ranch (1970) 9 Cal.App.3d 588. In that case, plaintiff migratory farmworkers sought an injunction prohibiting defendant ranch owners from knowingly employing illegal aliens. An action alleging unfair competition was brought under former Civil Code section 3369.

The court, while recognizing the farmworkers' need for protection, denied injunctive relief on the basis that federal action through the authority of the Immigration and Naturalization Service would be more efficacious than injunctive relief. "Plaintiffs seek the aid of equity because the national government has breached the commitment implied by national . . . policy. It is more orderly, more effectual, less burdensome to the affected interests, that the national government redeem its commitment. Thus the court of equity withholds its aid." (*Diaz,* supra, at p. 599.)

As discussed above, it is unclear whether the provisions of the Highway Beautification Act were intended to apply to outdoor advertising on Indian reservations at all. Even if this question were resolved in Desert's favor, however, we have concluded that Interior, rather than the Department, is the appropriate agency to enforce the act's provisions. The sound counsel of the *Diaz* decision, therefore, mandates state abstention in reliance upon federal enforcement in this case.

The summary judgments are reversed. [12]

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[12] Because we base our conclusion on grounds of federal preemption, we need not resolve the issue whether, as Naegele asserts, the lawsuits against it should be dismissed pursuant to Code of Civil Procedure section 389 on the basis that the Band is a necessary party which cannot be joined.

GRODIN, J.

WE CONCUR:
BIRD, C.J.
KAUS, J.
BROUSSARD, J.
REYNOSO, J.
LUCAS, J.

C O P Y

PEOPLE ex rel. DEPARTMENT OF TRANSPORTATION v. NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC.

L.A. 31911

CONCURRING OPINION BY MOSK, J.

I concur in the majority opinion.

In doing so, however, I wonder about the appearance of consistency when the court defers to *federal* control of Indian lands in a case involving billboards, after holding that traditional Indian hunting and fishing rights must yield to *state* control in a case involving fish and game laws. (In re Wilson (1981) 30 Cal.3d 21; but see dis. opn. by Mosk J. and Newman, J., at p. 37 ff.)

To offer a more convincing rationale in the instant matter, and to provide a recognizable pattern in the law, we should take this opportunity to overrule *Wilson*.

MOSK, J.

PEOPLE ex rel. DEPARTMENT OF TRANSPORTATION v. NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC., etc.

L.A. 31911

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TRIAL COURT & NO.:	Riverside County Superior Court Nos. 126069, 137500
TRIAL JUDGE:	Honorable J. William Mortland

APPENDIX B

ORDER DENYING REHEARING

L.A. No. 31911

IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE ex rel. DEPARTMENT OF TRANSPORTATION

V.

NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC.

DESERT OUTDOOR ADVERTISING, INC.

V.

NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC.

OPINION MODIFIED.

Respondent's petition for rehearing DENIED.

Broussard
Acting Chief Justice

COPY

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE ex rel. DEPARTMENT OF TRANSPORTATION, *Plaintiff and Respondent,* v. NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC., *Defendant and Appellant.*	L.A. 31911 (Super.Ct.No. 126069)
DESERT OUTDOOR ADVERTISING, INC., *Plaintiff and Respondent,* v. NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC., *Defendant and Appellant.*	(Super.Ct.No. 137500

MODIFICATION OF OPINION

BY THE COURT:

The opinion herein, appearing at 38 Cal.3d 509, is modified as follows:

1. On page 513, delete the words "and Desert Outdoor Advertising, Inc. (Desert)" after the words "[i]n 1977 the Band solicited proposals for further leases from several . . . firms including Naegele . . . ."

2. On page 517, the cite to *Portneuf-Marsh* should begin: "see . . ." so that the sentence will now read: "The board's interpretation of the Highway Beautification Act is debatable (see United States v. Portneuf-Marsh Valley Irr. Co. (E.D. Idaho 1913) 205 Fed. 416 419, affd. (9th Cir. 1914) 213 F. 601, 603), but we need not resolve that debate here."

3. On page 522, add the following: "See also People v. McCovey (1984) 36 Cal.3d 517, 525" to be inserted after the following language so that it now reads: "Nonetheless, amid the welter of decisions analyzing preemption in this unique context, the Supreme Court has recently reaffirmed that 'a State will certainly be without jurisdiction if its authority is preempted under familiar principles of preemption. . . .' (*New Mexico, supra,* 462 U.S. at pp. 333–334. See also People v. McCovey (1984) 36 Cal.3d 517, 525.)"

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

REMITTITUR

LA No. 31911

THE PEOPLE ex rel. DEPARTMENT OF TRANSPORTATION,
DESERT OUTDOOR ADVERTISING, INC.,
Plaintiffs and Respondents,
vs.
NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC.,
Defendant and Appellant.

Appeal
County Riverside
Superior Court
No. 120069
137500

The above-entitled cause having been heretofore fully argued, and submitted,

IT IS ORDERED, ADJUDGED, AND DECREED *by the Court that the summary judgments of the Superior Court of the County of Riverside in the above-entitled cause, are hereby reversed. Appellants shall recover costs on appeal.*

I, LAURENCE P. GILL, *Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing*

is a true copy of an original judgment entered in the above-entitled cause on the 2nd day of May, 1985.

WITNESS *my hand and the seal of the Court, this 11th day of July, 1985.*

LAURENCE P. GILL
Clerk

By D. McHENRY
Deputy

APPENDIX C

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

PEOPLE ex rel. DEPARTMENT OF TRANSPORTATION, *Plaintiff and Respondent,* v. NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC., etc., *Defendant and Appellant.*	4 Civil 27494 (Super.Ct.No. 126069)
DESERT OUTDOOR ADVERTISING, INC., etc., *Plaintiff and Respondent* v. NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC., etc., *Defendant and Appellant.*	4 Civil 27937 (Sup.Ct.No. 137500)

OPINION

APPEAL from the Superior Court of Riverside County. J. William Mortland, Judge. Affirmed.

Best, Best & Krieger, Barton C. Gaut, Ronald J. Kohut and Richard Cross for Appellant Naegele Outdoor Advertising Company of California.

Art Bunce as Amicus Curiae of the Morongo Band of Mission Indians on behalf of Appellant.

Robert F. Carlson, Chief Counsel, Gordon S. Baca, Deputy Chief Counsel, William M. McMillan and Ruby A. Theophile, for Respondent People ex rel. Department of Transportation.

Maxwell, Wright & Wheeler and Sprague Wheeler for Respondent Desert Outdoor Advertising, Inc.

This consolidated appeal stems from two separate judgments entered after the trial court granted each plaintiff's motion for summary judgment. Both cases, tried separately below, raise substantially the same issues and involve the same defendant. Because a resolution of these issues will have a significant effect on the Morongo Band of Mission Indians, we granted its request to file a brief amicus curiae.

I

The Morongo Band of Mission Indians (Band) is a federally-recognized Indian tribe, and is the beneficial owner of the Morongo Indian Reservation, consisting of approximately 32,300 acres of land located in Riverside County, California. The Morongo Indian Reservation was created by a series of seven executive orders of various Presidents of the United States, one presidential proclamation, one federal statute, and one deed, beginning in 1876 and ending in 1948. Under Patent Number

172786, the United States declared it will hold the said tracts of land ". . . in trust for the sole use and benefit of the said Morongo Band or Village of Indians, according to the laws of California. . . ."

The reservation lies astride a narrow pass between the San Bernardino and San Jacinto Mountain Ranges. As a result only a small portion of the land is located on the plain suitable for economic development. These relatively few acres lie adjacent to Interstate Highway 10, connecting Los Angeles to popular Southern California desert communities. Upon determining that the highest and best use of this land was outdoor billboard advertising, the Band's general membership delegated to its Tribal Council authority to negotiate agreements for an outdoor advertising business.

According to the brief of Amicus Curiae, the Band leased some of this reservation land to non-Indian firms who operated billboards there until 1977. In 1977 the Band solicited proposals for further leases from several non-Indian firms including Naegele Outdoor Advertising Company of California, Inc. (Naegele) and Desert Outdoor Advertising, Inc. (Desert). Naegele's bid was selected and a lease agreement followed.

Pursuant to title 25 of the United States Code, the Department of the Interior must approve such leases before they become effective. (25 U.S.C., § 415.) Upon submission, approval was denied because the designed purpose, in the department's opinion, would violate the Highway Beautification Act (23 USC, § 131 et seq.) and California's Outdoor Advertising Act (Bus. & Prof.

Code, § 5200 et seq.). Appeal was taken to the Interior Board of Indian Appeals, which resulted in the Interior Department's reversing its opinion concerning the applicability of the Highway Beautification Act. (*Administrative Appeal of the Morongo Band of Mission Indians* v. *Area Director, Sacramento Area Office* (1979) 86 I.D. 680.)

During the pendency of the Interior appeal, on March 30, 1978, the Band entered into an agency [1] agreement with Naegele. It provided for the installation, construction, operation and maintenance of 15 outdoor advertising structures located on reservation land. On June 27, 1978, the Department of Transportation (department) notified Naegele of its intention to apply and enforce California's Outdoor Advertising Act. In its brief the department expresses its philosophy of enforcement: "to control outdoor advertising consistent with state and federal law concern with environmental and aesthetic and safety purposes."

Despite the department's warning and implication that the displays would violate the Outdoor Advertising Act, 16 billboards were erected on reservation land. The state outdoor advertising inspector ultimately issued citations for all 16 displays.

On July 10, 1978, the People of the State of California, acting by and through the Department of Transportation filed a complaint and motion for preliminary and

[1] We take judicial notice of the fact that this agency agreement was approved on or about February 2, 1984, by the Bureau of Indian Affairs.

permanent injunction against Naegele. The complaint alleged Naegele was in control of 16 outdoor advertising structures located adjacent to Interstate Route 10 in Riverside County. These structures were in violation of section 5350 of the Business and Professions Code, requiring display permits. Additionally these displays have been illegally situated in violation of various provisions of the Outdoor Advertising Act. The department identified these displays as a public nuisance within the meaning of Business and Professions Code section 5461.

The preliminary injunction was granted on August 1, 1978. And, on November 6, 1981, in accordance with the department's motion, summary judgment resulted.

The action consolidated with that of the Department of Transportation's was initially filed by Desert on June 26, 1980. In its first amended complaint of December 12, 1980, Desert alleged causes of action for nuisance, unfair competition, intentional interference with prospective economic benefit and negligent interference with prospective economic benefit. Naegele's demurrer was sustained as to the nuisance cause of action. The court dismissed both causes of actions for interference and granted Desert's motion for summary judgment on the unfair competition cause of action. In its order the court enjoined Naegele from maintaining advertising structures on the reservation without complying with the Outdoor Advertising Act. Naegele was ordered to remove all non-complying structures. The enforcement of this judgment was stayed pending appeal to this court.

II

The Highway Beautification Act contains a particular section dedicated to the control of outdoor advertising. (23 U.S.C., § 131.) Congress has exhibited an intention of controlling outdoor advertising devices adjacent to the interstate highway system "in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." (23 U.S.C., § 131, subd. (a).)

Congress has limited the content of outdoor advertising devices located adjacent to interstate highways. Five acceptable categories have been identified. Loosely defined, they are: (1) Scenic attractions; (2) sale or lease of property; (3) activities conducted on the property on which displays are located; (4) landmarks; and (5) offers of free coffee to travelers. (23 U.S.C., § 131, subd. (c).) The implementation of these limits has been left to the individual states by way of an incentive/punishment system concerning federal-aid highway funds. In 23 United States Code section 131, subdivision (b), Congress provides a state's allotment of federal highway funds shall be reduced by 10 percent for failure to implement "effective control" over outdoor advertising devices. "Effective control" is then defined in the following subdivision to mean the five limits as described above.

California complies with the Highway Beautification Act by its Outdoor Advertising Act, Business and Professions Code section 5200 et seq. The Outdoor Advertising Act's policy behind highway advertising display regulation is "to promote the public safety, health, welfare,

convenience and enjoyment of public travel, to protect the public investment in such highways, to preserve the scenic beauty of lands bordering on such highways, and to insure that information in the specific interest of the traveling public is presented safely and effectively. . . ." (Bus. & Prof. Code, § 5226.)

Although outdoor advertising is recognized as a legitimate commercial use of property adjacent to highways (*id.*), several restrictions are imposed. First the advertiser must secure a permit prior to displaying the ad. (Bus. & Prof. Code, § 5350.) The code then limits the content of the displays to "(1) [d]irectional or other official signs or notices that are required or authorized by law, including, but not limited to, signs pertaining to natural wonders, scenic and historical attractions . . . (2) . . . advertising the sale or lease of the property upon which [the displays] are located . . . (3) [those] which advertise the business conducted or services rendered or the goods produced or sold upon the property upon which the advertising display is placed. . . . (4) [m]essage center displays, provided they advertise the business conducted or services rendered or goods produced or sold upon the property upon which the display is placed. . . . (5) [those] erected or maintained pursuant to regulations of the director, and not inconsistent with the national policy set forth in subdivision (f) [2] of Section 131 of Title 23 of the United States Code

[2] 23 United States Code section 131, subdivision (f), provides: "The Secretary shall, in consultation with the States, provide within the rights-of-way for areas at appropriate distances from interchanges on the Interstate System, on which signs, displays,

and the standards promulgated thereunder by the Secretary of Transportation, and designed to give information in the specific interest of the traveling public." (Bus. & Prof. Code, § 5405.) Finally certain safety measures involving size, spacing and location are imposed. (Bus. & Prof. Code, §§ 5403, 5404, and 5408.)

III

The lower court in both cases concluded the Outdoor Advertising Act was applicable in its summary judgment rulings. This appeal therefore raises the issue of whether the Outdoor Advertising Act applies to a non-Indian company acting pursuant to an agency agreement providing for the construction and maintenance of advertising display devices on reservation land held in trust by the United States for the beneficial use of the Morongo Band Mission Indians.

IV

The applicability of a statute is unquestionably an issue of law. (*Killian* v. *City and County of San Francisco* (1978) 77 Cal.App.3d 1, 7; 6 Witkin, Cal. Procedure (2d ed.) §§ 209–210, pp. 4200–4201.) As such the trial court properly resolved this question by way of summary

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and devices giving specific information in the interest of the traveling public may be erected and maintained. The Secretary may also, in consultation with the States, provide within the rights-of-way of the primary system for areas in which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. Such signs shall conform to national standards to be promulgated by the Secretary."

judgment. Where there is no material issue of fact to be tried and the sole question remaining is one of law, it is the duty of the court to determine the issue of law. (*Angelus Chevrolet* v. *State of California* (1981) 115 Cal.App.3d 995, 1000; *Zahn* v. *Canadian Indem. Co.* (1976) 57 Cal.App.3d 509, 512; *Vincent* v. *State of California* (1971) 22 Cal.App.3d 566, 570.) As indicated below, the Outdoor Advertising Act's applicability hinges on a federal pre-emption approach. To complicate matters, that approach, as it applies to Indians, calls for a balancing of interests. Nevertheless, the main issue here is the applicability of a statute, which is a question of law—properly determined by the lower court.

V

A review of American history reveals the inconsistency with which the Indians have been treated. As the American pioneers forged westward, they in turn pushed the Indians into unexplored lands where they were free to govern themselves. However, continued American westward movement made it evident that the Indians could not be isolated forever. "[T]he United States [therefore] began to consider the Indians less as foreign nations and more as a part of our country." (*Organized Village of Kake* v. *Egan* (1962) 369 U.S. 60, 72 [7 L.Ed.2d 573, 581; 82 S.Ct. 562].) Nevertheless, the Supreme Court committed the United States to a policy of leaving the Indians free from state jurisdiction. The Indian nations were "distinct political communities, having territorial boundaries, within which their author-

ity is exclusive, and having a right to all the lands within those boundaries which is not only acknowledged but guaranteed by the United States." (*Worcester* v. *The State of Georgia* (1832) 6 Pet. 515, 557 [8 L.Ed. 483, 499] overruled on other grounds in *Mescalero Apache Tribe* v. *Jones* (1973) 411 U.S. 145 [36 L.Ed.2d 114; 93 S.Ct. 1267].)

Worcester indicated the United States intended to deal with the Indians as sovereigns, however, since that time the Indian sovereignty doctrine has "undergone considerable evolution in response to changed circumstances." (*McClanahan* v. *Arizona Tax Commission* (1973) 411 U.S. 164, 171 [36 L.Ed.2d 129, 135; 93 S.Ct. 1257] overruled on other grounds in *Bryan* v. *Itasca County* (1976) 426 U.S. 373 [48 L.Ed.2d 710; 96 S.Ct. 2102.) For example where Indians have left the reservation, state laws have been held applicable to such individuals. (*Oklahoma Tax Com.* v. *United States* (1943) 319 U.S. 598 [87 L.Ed. 1612; 63 S.Ct. 1284].) And, under certain circumstances, a state may validly assert authority over the affairs of non-Indians on a reservation. (*Washington* v. *Confederate Tribes* (1980) 447 U.S. 134 [65 L.Ed.2d 10; 100 S.Ct. 2069].) The continuing development of this doctrine proves "the relation of the Indian Tribes living within the borders of the United States . . . is an anomolous one and of a complex character. . . ." (*United States* v. *Kagema* (1886) 118 U.S. 375, 381 [30 L.Ed. 228, 230; 6 S.Ct. 1109].)

The recent Supreme Court trend, at least insofar as the applicability of state laws to Indians is concerned,

has been away from the idea of inherent Indian sovereignty and toward reliance on federal pre-emption. (*Rice* v. *Rehner* (July 1, 1983) 51 U.S.L.Week 5141, 5142.) "The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power." (*McClanahan* v. *Arizona Tax Commission, supra,* 411 U.S. 169, 172.)

The question of whether federal law pre-empts the state's exercise of its regulatory authority is not answered by a traditional pre-emption approach. (*Ramah Navajo Sch. Bd.* v. *Bureau of Revenue* (1982) 458 U.S. 832 [73 L.Ed.2d 1174, 1180; 102 S.Ct. 3394].) Indian sovereignty, as it has developed now manifests itself in this pre-emption analysis in such a way to "provide a backdrop against which the applicable treaties and federal statutes must be read." (*McClanahan, supra,* 411 U.S. at 172; *Rice, supra,* 51 U.S.L.Week at 5142.) The Supreme Court has articulated this unique pre-emption approach in a variety of ways. "Individualized treatment [is now given to] particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians and the Federal Government." (*Mescalero Apache Tribe* v. *Jones* (1973) 411 U.S. 145, 148 [36 L.Ed.2d 114, 119; 93 S.Ct. 1267].) State law may unlawfully "infringe on the right of reservation Indians to make their own laws and be ruled by them." (*Williams* v. *Lee* (1959) 358 U.S. 217, 220 [3 L.Ed.2d 251, 254; 79 S.Ct. 269].) "The tradition of Indian sovereignty over the reservation and

tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law." (*White Mountain Apache Tribe* v. *Bracker* (1980) 448 U.S. 136, 143 [65 L.Ed.2d 665, 672; 100 S.Ct. 2578].) Pre-emption "calls for a particularized inquiry into the nature of the state, federal and tribal interests at stake. . . . State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law unless the state interests at stake are sufficient to justify assertion of state authority." (*New Mexico* v. *Mescalero Apache Tribe* (June 13, 1983) 52 U.S.L.Week 4741, 4743-4744.) "The role of tribal sovereignty in pre-emption analysis varies in accordance with the particular 'notions of sovereignty that have developed from historical traditions of tribal independence.' [Citation.] These traditions themselves reflect the 'accommodation between the interests of the tribes and the federal government, on the one hand, and those of the state, on the other. [Citation.]" (*Rice, supra,* 51 U.S.L.Week at 5142.)

We read from these cases an ad hoc balancing approach [3] concerning pre-emption of state laws as they affect Indians. "When on-reservation conduct involving only Indians is at issue, state law is generally inapplica-

[3] We are mindful that in applying this balancing approach "[a]mbiguities in the federal law have been construed generously [in the Indian's favor] in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence." (*White Mountain Apache Tribe* v. *Bracker, supra,* 448 U.S. 136, 143–144.)

ble, for the state's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." (*Bracker, supra,* 448 U.S. at 144.) Therefore, Indians retain powerful control and authority to regulate their internal and social relations on the reservation. Congress' goal of encouraging tribal self-sufficiency and economic development presents a nearly insurmountable barrier to the states should they attempt to regulate in these particular areas. (*Mescalara* (sic) *Apache Tribe, supra,* 51 U.S.L.Week at 4743–4744.) However, this is not the case with respect to the Outdoor Advertising Act.

In fact, the general context in which this case comes to us is quite different from nearly all the cases to which we are cited. Primarily in these cases no *particular* federal statute is in issue. Rather the issue is whether a particular state statute can be applied to the Indians in light of the strong federal interest of encouraging Indian self-sufficiency and Congress' control over the Indians. (U.S. Const., art. I, § 8, cl. 13.) For example, in *White Mountain Apache Tribe* v. *Bracker, supra,* 448 U.S. 136, the issue was the applicability of a state license and fuel use tax (not particularly authorized by Congress) to activities of non-Indians engaged in commerce on Indian lands. The court found the state laws pre-empted by applying the balancing approach as discussed above. *Ramah Navajo Sch. Bd.* v. *Bureau of Revenue, supra,* 458 U.S. 832, and *Santa Rosa Band of Indians* v. *Kings County* (9th Cir. 1975) 532 F.2d 655, *cert. den., Kings County* v. *Santa Rosa Band of Indians* (1977) 429 U.S. 1038 [50

L.Ed.2d 748, 97 S.Ct. 121] required the respective courts to determine if certain congressional procedures were so pervasive that they pre-empted the effect of particular state statutes on the Indians. Again, no federal statute was applicable.

Contrast *Leavenworth, etc. R.R. Co.* v. *United States* (1875) 92 U.S. 733 [23 L.Ed. 634], which presents a similar format to the case at bar. In *Leavenworth,* Congress passed a particular statute allowing the states to acquire certain lands to aid in the construction of railroads. The issue before the court was whether the state could properly acquire Indian reserved lands. The statute was in general terms which neither included nor excluded any particular lands. The court concluded that absent an express declaration, the Indian lands were excluded from this statute. (92 U.S. at 741, 744.) Further the Indian lands were expressly excluded from the act's reach: "That any and all lands heretofore reserved to the United States, by any Act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby reserved to the United States from the operation of this Act. . . ." (92 U.S. at 746.)

The instant case involves a federal statute (Highway Beautifiction Act) which authorizes the state to act. Unlike the *Leavenworth* statute, the Highway Beautification Act provides:

"All public lands or *reservations of the United States* which are adjacent to any portion of the Interstate sys-

tem and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary." (23 U.S.C., § 131, subd. (h); emphasis supplied.)

We are thus confronted with the issue of whether, in light of the balancing approach discussed above, section 131, subdivision (h), authorizes the state to reach Indian land. In effect, we are dealing with the flip side of preemption analysis.

Both sides present strong arguments on whether the Highway Beautification Act authorizes states to control Indian lands particularly in light of section 131, subdivision (h). Plaintiffs point out the House Report summarizing the legislative intent of the Highway Beautification Act supports their interpretation that the Outdoor Advertising Act reaches Indian land: "This section simply extends to all public lands and reservations of the United States which are adjacent to any portion of the Interstate System or the primary system the same control, covering other roads which are subject to this legislation." (2 U.S. Code Cong. & Admin. News (1965) 89th Cong., 1st Sess., 3717.)

Regarding this same section, plaintiffs assert the term "reservation" had to include Indian reservation because the House discussed *Indian* Reservations in their debates on this legislation: ". . . A great many tourists who travel through South Dakota like to stop and visit our Sioux Indian Reservations. . . . South Dakota has at least five great Indian Reservations. Some of the highways pass through some of the reservations. . . . Our

fine Indian citizens encourage the people . . . to stop and get acquainted with Indian ways . . . [¶]But there is no way in the world that tourists who desire to take advantage of such opportunities can do so unless it is by signs directing them off a highway to a reservation. . . ." (III Committee Hearing on Floor Debates, Cong. News, part 18, 89th Cong., 1st Sess., at p. 24123.)

Desert also points out the legislators were informed that this country contained some 41,000 miles of Interstate Highway. They also knew the Interstate paralleled Indian land; so by specifying "forty-one thousand miles" in the Act (see 23 U.S.C., § 131, subd. (e) (1)) they must necessarily have intended it to apply to the adjacent Indian land.

Further, plaintiffs cite us to *United States* v. *Portneuf-Marsh Valley R.R. Co.* (1913) 205 F. 416, where at page 419, the court states: "That an Indian reservation is a 'reservation of the United States' admits of little doubt."

Conversely, defendant and amicus curiae argue that the Federal Highway Administration's interpretation of the Highway Beautification Act should be given deference. It concluded the "failure of the Act to delegate either to the Federal Highway Administration, Department of Transportation, or to the Department of the Interior, the explicit authority to implement the act on Indian reservations results in nonapplicability to Indian reservations. . . ."

We are also urged to give deference to the Department of the Interior's interpretation that the Highway Beautification Act does not apply to Indian reservations.

The Interior department stated that "absence of statutory language expressly including or excluding Indian reservations as territory subject to the [Highway Beautification Act] renders the term 'reservations' as used in section 131(h), ambiguous."[4] And "doubtful statutory language must be interpreted in favor of the Indians." (*Administrative Appeal of the Morongo Band of Mission Indians* v. *Area Director, supra,* 86 I.D. 680, 687–688.)

Having thus far set out the standards, the law, and the arguments, we must now apply the balancing approach to determine if the Outdoor Advertising Act has been pre-empted. As stated, this is not a traditional pre-emption analysis because (1) the Outdoor Advertising Act affects Indians and (2) there is a Congressional Act which purportedly authorized state regulation. There is no question that the Outdoor Advertising Act affects the Morongo Indian Tribe. Clearly any regulatory scheme limiting economic pursuits will have an effect. However, outdoor advertising can hardly be deemed a traditional Indian custom affecting tribal relations on the reservation.

More importanty, we find the Highway Beautification Act specifically contemplated and authorized states to regulate outdoor advertising on Indian lands adjacent to Interstate Highways. Congress no doubt intended its Highway Beautification Act policies to be applied over

[4] See also *United States* v. *Celestine* (1909) 215 U.S. 283, 285 [54 L.Ed. 195, 197] for a discussion of inherent problems of interpreting "reservation" always to include Indian country.

all interstate highways. A checkerboard effect would defeat this intent, and such effect is precisely what would result should we find the Outdoor Advertising Act inapplicable in this case. Regarding the displays in this case, we conclude the Outdoor Advertising Act does apply.

Having concluded the Highway Beautification Act authorizes state regulation, we need not and do not reach the issue of whether 28 United States Code section 1360 (Public Law 280) would independently authorize the application of the Outdoor Advertising Act.

VI

Defendant also mounts a procedural attack based on Code of Civil Procedure section 389,[5] joinder of

[5] Code of Civil Procedure section 389, subdivisions (a) and (b) provide:

"(a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

"(b) If a person as described in paragraph (1) or (2) of subdivision (a) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's ab-

indispensable party. The argument is made that the Band, as an Indian tribe enjoys immunity from suit. [6] Because the Band is an indispensable party concerning the two actions below, defendant asserts section 389 mandates dismissal.

The failure to join an indispensable party is not a jurisdictional defect mandating dismissal. "[T]he court still has power to render a decision as to the parties before it which will stand." (*Kraus* v. *Willow Park Public Golf Course* (1977) 73 Cal. App.3d 354, 364.) The court must determine whether in "equity and good conscience" the action will proceed. We believe it should and did proceed because there was no pre-emption in this case. "While under some circumstances a state may exercise concurrent jurisdiction over non-Indians acting on tribal reservations, [citations] such authority may be asserted only if not pre-empted by operation of federal law." (*Mescalero Apache Tribe*, *supra*, 51 U.S.L.Week at p. 4743.) In this instance, the state courts must necessarily have the power to enforce state laws. The Band may not hide behind this procedural camouflage in order to escape the Outdoor Advertising Act.

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sence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder."

[6] Indian immunity from the governing arm of the state courts is not a foregone conclusion in every case. As indicated in the recent *Southwest Forest Industries v. Hupa (Hoopa) Timber Corporation* (Jan. 26, 1984, 1 Civ. AO 15598; 84 D.A.R. 526) ___ Cal.App. 3d ___, local tribunals in each instance can and will determine if Congress has authorized state court action. In the present case, however, Indian immunity need not be addressed because the Morongo Indian Tribe is not a party.

VII

The judgment as to both actions is affirmed.

CERTIFIED FOR PUBLICATION

Rickles
J.

We concur:

Kaufman
Acting P. J.

McDaniel
J.

APPENDIX D

Title 23, United States Code

§131. Control of outdoor advertising.

(a) The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.

(b) Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices which are within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of the system, and Federal-aid highway funds apportioned on or after January 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of those additional outdoor advertising signs, displays, and devices which are more than six hundred and sixty feet off the nearest edge of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall be reduced by amounts equal to 10 per centum of the

amounts which would otherwise be apportioned to such State under section 104 of this title, until such time as such State shall provide for such effective control. Any amount which is withheld from apportionment to any State hereunder shall be reapportioned to the other States. Whenever he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of this subsection to a State.

(c) Effective control means that such signs, displays, or devices after January 1, 1968, if located within six hundred and sixty feet of the right-of-way and, on or after July 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, if located beyond six hundred and sixty feet of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall, pursuant to this section, be limited to (1) directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which

they are located, (3) signs, displays, and devices, including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located, (4) signs lawfully in existence on October 22, 1965, determined by the State, subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, of historic or artistic significance the preservation of which would be consistent with the purposes of this section, and (5) signs, displays, and devices advertising the distribution by nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system. For the purposes of this subsection, the term "free coffee" shall include coffee for which a donation may be made, but is not required.

(d) In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are zoned industrial of [sic] commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. The States shall have full authority under their own zoning laws to

zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act. Whenever a bona fide State, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority. Nothing in this subsection shall apply to signs, displays, and devices referred to in clauses (2) and (3) of subsection (c) of this section.

(e) Any sign, display, or device lawfully in existence along the Interstate System or the Federal-aid primary system on September 1, 1965, which does not conform to this section shall not be required to be removed until July 1, 1970. Any other sign, display, or device lawfully erected which does not conform to this section shall not be required to be removed until the end of the fifth year after it becomes nonconforming.

(f) The Secretary shall, in consultation with the States, provide within the rights-of-way for areas at appropriate distances from interchanges on the Interstate System, on which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. The Secretary may also, in consultation with the States, provide within the rights-of-way of the primary system for areas in which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. Such signs shall conform to national standards to be promulgated by the Secretary.

(g) Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law and not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section. The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

(A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and

(B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon.

(h) All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary.

(i) In order to provide information in the specific interest of the traveling public, the State highway departments are authorized to maintain maps and to permit information directories and advertising pamphlets to be made available at safety rest areas. Subject to the approval of the Secretary, a State may also establish information centers at safety rest areas and other travel information systems within the rights-of-way for the purpose of informing the public of places of interest within the State and providing such other information as a State may consider desirable. The Federal share of the

cost of establishing such an information center or travel information system shall be that which is provided in section 120 for a highway project on that Federal-aid system to be served by such center or system.

(j) Any State highway department which has, under this section as in effect on June 30, 1965, entered into an agreement with the Secretary to control the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System shall be entitled to receive the bonus payments as set forth in the agreement, but no such State highway department shall be entitled to such payments unless the State maintains the control required under such agreement: *Provided,* That permission by a State to erect and maintain information displays which may be changed at reasonable intervals by electronic process or remote control and which provide public service information or advertise activities conducted on the property on which they are located shall not be considered a breach of such agreement or the control required thereunder. Such payments shall be paid only from appropriations made to carry out this section. The provisions of this subsection shall not be construed to exempt any State from controlling outdoor advertising as otherwise provided in this section.

(k) Subject to compliance with subsection (g) of this section for the payment of just compensation, nothing in this section shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-aid highway sys-

tems than those established under this section.

(*l*) Not less than sixty days before making a final determination to withhold funds from a State under subsection (b) of this section, or to do so under subsection (b) of section 136, or with respect to failing to agree as to the size, lighting, and spacing of signs, displays, and devices or as to unzoned commercial or industrial areas in which signs, displays and devices may be erected and maintained under subsection (d) of this section, or with respect to failure to approve under subsection (g) of section 136, the Secretary shall give written notice to the State of his proposed determination and a statement of the reasons therefor, and during such period shall give the State an opportunity for a hearing on such determination. Following such hearing the Secretary shall issue a written order setting forth his final determination and shall furnish a copy of such order to the State. Within forty-five days of receipt of such order, the State may appeal such order to any United States district court for such State, and upon the filing of such appeal such order shall be stayed until final judgment has been entered on such appeal. Summons may be served at any place in the United States. The court shall have jurisdiction to affirm the determination of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the United States court of appeals for the circuit in which the State is located and to the Supreme Court of the United States upon certiorari or certification as provided in title 28, United States Code, section 1254. If any part of an apportionment to a State

is withheld by the Secretary under subsection (b) of this section or subsection (b) of section 136, the amount so withheld shall not be reapportioned to the other States as long as a suit brought by such State under this subsection is pending. Such amount shall remain available for apportionment in accordance with the final judgment and this subsection. Funds withheld from apportionment and subsequently apportioned or reapportioned under this section shall be available for expenditure for three full fiscal years after the date of such apportionment or reapportionment as the case may be.

(m) There is authorized to be appropriated to carry out the provisions of this section, out of any money in the Treasury not otherwise appropriated, not to exceed $20,000,000 for the fiscal year ending June 30, 1966, not to exceed $20,000,000 for the fiscal year ending June 30, 1967, not to exceed $2,000,000 for the fiscal year ending June 30, 1970, not to exceed $27,000,000 for the fiscal year ending June 30, 1971, not to exceed $20,500,000 for the fiscal year ending June 3, 1972, and not to exceed $50,000,000 for the fiscal year ending June 30, 1973. The provisions of this chapter relating to the obligation, period of availability and expenditure of Federal-aid primary highway funds shall apply to the funds authorized to be appropriated to carry out this section after June 30, 1967.

(n) No sign, display, or device shall be required to be removed under this section if the Federal share of the just compensation to be paid upon removal of such sign, display, or device is not available to make such payment.

(*o*) The Secretary may approve the request of a State to permit retention in specific areas defined by such State of directional signs, displays, and devices lawfully erected under State law in force at the time of their erection which do not conform to the requirements of subsection (c), where such signs, displays, and devices are on [sic] existence on the date of enactment of this subsection and where the State demonstrates that such signs, displays, and devices (1) provide directional information about goods and services in the interest of the traveling public, and (2) are such that removal would work a substantial economic hardship in such defined area.

(p) In the case of any sign, display, or device required to be removed under this section prior to the date of enactment of the Federal-Aid Highway Act of 1974, which sign, display, or device was after its removal lawfully relocated and which as a result of the amendments made to this section by such Act is required to be removed, the United States shall pay 100 per centum of the just compensation for such removal (including all relocation costs).

(q) (1) During the implementation of State laws enacted to comply with this section, the Secretary shall encourage and assist the States to develop sign controls and programs which will assure that necessary directional information about facilities providing goods and services in the interest of the traveling public will continue to be available to motorists. To this end the Secretary shall restudy and revise as appropriate existing

standards for directional signs authorized under subsections 131(c)(1) and 131(f) to develop signs which are functional and esthetically compatible with their surroundings. He shall employ the resources of other Federal departments and agencies, including the National Endowment for the Arts, and employ maximum participation of private industry in the development of standards and systems of signs developed for those purposes.

(2) Among other things the Secretary shall encourage States to adopt programs to assure that removal of signs providing necessary directional information, which also were providing directional information on June 1, 1972, about facilities in the interest of the traveling public, be deferred until all other nonconforming signs are removed.

APPENDIX E

California Business and Professions Code

§ 5226. Regulation of advertising displays adjacent to interstate or primary highways; declaration of necessity

The regulation of advertising displays adjacent to any interstate highway or primary highway as provided in Section 5405 is hereby declared to be necessary to promote the public safety, health, welfare, convenience and enjoyment of public travel, to protect the public investment in such highways, to preserve the scenic beauty of lands bordering on such highways, and to insure that information in the specific interest of the traveling public is presented safely and effectively, recognizing that a reasonable freedom to advertise is necessary to attain such objectives. The Legislature finds:

(a) Outdoor advertising is a legitimate commercial use of property adjacent to roads and highways.

(b) Outdoor advertising is an integral part of the business and marketing function, and an established segment of the national economy, and should be allowed to exist in business areas, subject to reasonable controls in the public interest.